No. 00-1030

In the Supreme Court of the United States

GRANT VENEY LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, after taking judicial notice of the fact that Fort Belvoir fell within the special maritime and territorial jurisdiction of the United States, properly instructed the jury that, if it found that petitioner's offense occurred at Fort Belvoir, it "may" find that the jurisdictional element had been proved.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 230 F.3d 1355 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2000. The petition for a writ of certiorari was filed on December 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted under 18 U.S.C. 2241(a)(1) for committing aggravated sexual abuse "in the special maritime and ter-

ritorial jurisdiction of the United States or in a Federal prison." He was sentenced to 210 months' imprisonment. Pet. App. 2a. The court of appeals affirmed. *Id.* at 1a-8a.

1. Petitioner and his victim, referred to in the record by her initials "LL," worked at the Defense Logistics Agency (DLA) on the grounds of Fort Belvoir in Virginia. LL is moderately to severely mentally retarded and has a severe speech impediment and cerebral palsy. Petitioner is not handicapped. Pet. App. 2a-3a; Gov't C.A. Br. 2.

On December 21, 1998, LL reported to her job at the DLA. Between approximately 9:30 and 10:30 in the morning, petitioner directed LL to "come here." Petitioner then took LL to a custodial supply closet in the basement of the building. Pet. App. 3a. Once they were inside the closet, petitioner closed and locked the door. He began to touch LL's breasts. Though LL directed him to stop, he eventually engaged in intercourse with her. *Ibid.* This hurt LL a "whole lot" and she attempted to push petitioner away. Petitioner told LL not to tell anyone what he had done, and the two left the closet. *Ibid.*; Gov't C.A. Br. 4. LL did notify her supervisors about the sexual assault and later that day sought a medical examination that confirmed the assault. Pet. App. 3a-4a.

2. At trial, the district court charged the jury on the jurisdictional element of the offense as follows:

> *The Government must prove as one of the elements required to be proved beyond a reasonable doubt that the offense charged in the indictment occurred within the special maritime and territorial jurisdiction of the United States.*

> The Government has offered evidence that the [offense] occurred at Fort Belvoir, Virginia. The Court has taken judicial notice that Fort Belvoir, Virginia is within the jurisdiction of the United States for purposes of this statute.
>
> If you find that the offense occurred at Fort Belvoir, Virginia, then you *may* find that this element has been proved.
>
> If you find that the offense did not occur at Fort Belvoir, Virginia, then it is your duty to find the defendant not guilty.

Pet. App. 11a (emphases added). Petitioner did not object to that instruction. The jury found petitioner guilty of aggravated sexual assault.

3. On appeal, petitioner argued, among other things, that the district court wrongfully took judicial notice of the jurisdictional element of 18 U.S.C. 2241(a) and failed to instruct the jury that it was not required to accept the judicial notice as conclusive. The court of appeals rejected the argument, first noting its long-standing view that a "district court may take judicial notice" of the jurisdictional element. Pet. App. 7a (quoting *United States* v. *Lavender*, 602 F.2d 639, 641 (4th Cir. 1979)). The court then held that judicial notice of the jurisdictional element was appropriate in petitioner's case because it was generally known within the jurisdiction of the trial court that Fort Belvoir is within the special maritime and territorial jurisdiction of the United States and this fact was "verifiable from 'sources whose accuracy cannot reasonably be questioned.'" *Ibid.* (quoting Fed. R. Evid. 201(b)).

ARGUMENT

Petitioner contends (Pet. 9-17) that the district court's instruction on the jurisdictional element was "tantamount to a directed verdict for the government" (Pet. 16) and thus violated "[p]etitioner's Sixth Amendment and due process rights to have a jury decide all elements of the crime beyond a reasonable doubt" (Pet. 9). That contention lacks merit and does not warrant this Court's review. The jury instructions explicitly stated that the jury was required to find the jurisdictional element of the crime beyond a reasonable doubt. The court then instructed the jury that it "may" find that element proved based on the court's taking judicial notice of the fact that Fort Belvoir is within the territorial jurisdiction of the United States for purposes of the statute under which petitioner was prosecuted. That instruction did not deprive the jury of a role in finding the jurisdictional element. In any event, even if the court had instructed the jury that its judicial notice was conclusive, such a decision would not have been error because the jurisdictional status of Fort Belvoir is a legislative, as opposed to an adjudicative, fact. In addition, petitioner did not object to the trial court's instruction to the jury and thus can prevail only if he can demonstrate that he suffered plain error from the instruction. For these reasons, further review is not warranted.

1. The premise of the petition—that the "district court * * * removed the determination of an element of the offense from the jury"—is not correct. In addition to the general instruction that the government must prove each element of the crime beyond a reasonable doubt, the jury instructions specifically stated that the "Government must prove as one of the elements

required to be proved beyond a reasonable doubt that the offense charged in the indictment occurred within the special maritime and territorial jurisdiction of the United States." Pet. App. 11. Then, after stating that the district court had taken judicial notice that Fort Belvoir is within the jurisdiction of the United States, the Court explained that "[i]f you find that the offense occurred at Fort Belvoir, Virginia, then you *may* find that this element has been proved." *Ibid.* (emphasis added). That instruction clearly did not require the jury to accept the fact judicially noticed.

Petitioner nevertheless argues that the instruction was defective because it did not include the precise language of Federal Rule of Evidence 201(g), which states that when a court takes judicial notice of an adjudicative fact in "a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." As discussed *infra*, Rule 201(g) does not apply to the legislative fact of Fort Belvoir's jurisdictional status, and the court was therefore not required to frame an instruction in accordance with Rule 201(g). But even if the rule were applicable, it would not help petitioner. Although the jury instruction in this case used the word "may" and omitted the clause "but is not required to," petitioner cites no cases suggesting that a jury instruction must include the exact words "but is not required to" in order to avoid giving the jury the impression that it must accept as conclusive a matter of which the court took judicial notice. That impression was not created in this case. The court's recitation that the jurisdictional element, like all others, must be proved beyond a reasonable doubt and its use of the discretionary word "may" informed the jury that it was still the final arbiter of the jurisdictional element. In addition, the

sentence containing the word "may" was immediately followed by a sentence containing mandatory language: "If you find that the offense did not occur at Fort Belvoir, Virginia, then *it is your duty* to find the defendant not guilty." Pet. App. 11a. That contrast further highlighted that it was still within the discretion of the jury to accept or reject the fact that Fort Belvoir is "within the special maritime and territorial jurisdiction of the United States." *Id.* at 2a.

Because the jury was not instructed that it had to accept the fact judicially noticed, this "Court's precedents prohibiting a directed verdict for the Government on an element of a crime" (Pet. 15-17) are not implicated.

2. The due process and Sixth Amendment concerns raised in those cases are not implicated for yet another reason. The jurisdictional status of Fort Belvoir is a legislative fact rather than an adjudicative fact. The requirements of Federal Rule of Evidence 201 apply only to adjudicative facts, see Fed. R. Evid. 201(a) ("This rule governs only judicial notice of adjudicative facts."), and it is only with respect to adjudicative facts that courts have voiced due process and Sixth Amendment concerns when a court fails to notify the jury that it need not accept the fact judicially noticed as conclusive. Petitioner cites no cases stating that judicial notice of legislative facts raises these concerns. Thus, petitioner could not show plain error even if the trial court in this case had failed to instruct the jury that the government was still required to prove beyond a reasonable doubt the jurisdictional element of the crime.

Several courts of appeals have held that it is appropriate for a trial court to take judicial notice of the legislative fact whether a location is "within the special

maritime and territorial jurisdiction of the United States." See *United States* v. *Hernandez-Fundora*, 58 F.3d 802, 807-812 (2d Cir.), cert. denied, 515 U.S. 1127 (1995); *United States* v. *Bowers*, 660 F.2d 527, 530-531 (5th Cir. 1981) (per curiam); *United States* v. *Piggie*, 622 F.2d 486 (10th Cir.), cert. denied, 449 U.S. 863 (1980); *United States* v. *Blunt*, 558 F.2d 1245, 1247 (6th Cir. 1977) (per curiam). As the Second Circuit has explained, "[l]egislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case. * * * Unlike an adjudicative fact, [the fact that a place is under federal jurisdiction] does not change from case to case but, instead, remains fixed." 58 F.3d at 812 (citations omitted); see also *Bowers*, 660 F.2d at 531 ("Unlike an adjudicative fact, this fact does not change from case to case but, instead, remains fixed.").[1]

The jurisdictional status of Fort Belvoir is an established fact that does not change from case to case. Indeed, in 1983 a military court, on appeal, took judicial notice of the fact that Fort Belvoir fell within the special maritime and territorial jurisdiction of the United States. *United States* v. *Bartole*, 16 M.J. 534, 535 (A.C.M.R. 1983), aff'd, 21 M.J. 234 (C.M.A. 1986). The court pointed out that, as in petitioner's case, there was "no dispute that the offense occurred within the

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[1] A leading administrative law treatise supports this analysis: "Whether 123 C Street is inside or outside the city is a question about 123 C Street, not about a party. The question whether X lives in the city is a question of adjudicative fact, but, even though X lives at 123 C Street, the fact that that address is within the city is not an adjudicative fact." 2 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 10.6, at 155 (3d ed. 1994), cited in *Hernandez-Fundora*, 58 F.3d at 812.

boundary of Fort Belvoir[,] and section 7.1-18.1 of the Code of Virginia (Supp. 1982) specifically provides that Virginia has ceded concurrent jurisdiction to the Federal Government over military forts of which Fort Belvoir is included." *Id.* at 536.

Two courts of appeals have taken a somewhat different approach to judicial notice of whether certain property is within the jurisdiction of the United States, but those decisions do not conflict with the result in this case. In *United States* v. *Bello*, 194 F.3d 18, 22-26 (1st Cir. 1999), the court held that the location of a prison within the jurisdiction of the United States was an adjudicative fact of which a court could take judicial notice under Federal Rule of Evidence 201(b). The court went on to hold that the jury must then be instructed that it may, but is not required to, accept the fact judicially noticed in accordance with Rule 201(g). But any tension between *Bello* and the decisions in other circuits cited above does not warrant further review in this case. The court in *Bello* specifically did not decide whether Section 201(g)'s approach "is constitutionally compelled," 194 F.3d at 26 n.10, and it noted that most States make judicially noticed facts binding on the jury, *ibid.* Moreover, nothing in *Bello* suggests that the court would find the permissive instruction given in this case to be deficient, particularly when no objection was made at the trial level and the issue is reviewable on appeal only for plain error. There is therefore no reason to believe that this case would have been decided any differently in the First Circuit.

In *United States* v. *Williams*, 17 M.J. 207 (1984), the United States Court of Military Appeals agreed that a trial court may be able to take judicial notice of the jurisdictional status of federal property. But it refused

to take judicial notice on appeal of the jurisdictional status of the property involved in that case, when the trial judge "was never requested to take judicial notice" and the case involved a number of factual "complications."[2] *Id.* at 212-214. While the court indicated that in that case, the existence of federal jurisdiction over the military installation at issue (Fort Hood) should have been left for decision by the court members at trial, *id.* at 215, the court's decision turned heavily on the complex nature of Fort Hood as an installation only part of which is subject to federal jurisdiction. The court took note of cases (such as *United States* v. *Blunt*, *supra*, and *United States* v. *Bowers*, *supra*) that had taken conclusive judicial notice of "the jurisdictional status of the location where an offense occurred," 17 M.J. at 213, and distinguished those cases, rather than rejecting them, on the ground that they "did not involve forts or other facilities of which, as here, only a part is subject to Federal jurisdiction," *id.* at 214. *Williams* thus does not hold that judicial notice of the jurisdictional status of all properties as a legislative fact is per se out of bounds. And in light of the established status of Fort Belvoir, judicial notice was appropriate here.[3]

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[2] In *Williams*, among other factual complications, the defendant was charged with kidnapping for allegedly forcing a person into his car, driving for a while, and then robbing the person. The victim testified that the kidnapping began at Fort Hood, but the defendant testified that the victim asked him for a ride outside of Fort Hood. 17 M.J. at 209-210.

[3] The other two cases that petitioner cites did not involve judicial notice of a site's location in "the special maritime and territorial jurisdictional of the United States," but involved judicial notice of the fact that a bank's deposits were FDIC-insured, see *United States* v. *Mentz*, 840 F.2d 315 (6th Cir. 1988) (prosecution

3. Even if the jury instruction was erroneous, petitioner would have to establish plain error because he did not object to the instruction in the district court. See Fed. R. Crim. P. 52(b). Under the plain error rule, before an appellate court can correct an error that was not raised at trial, "there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). If those three conditions are met, "an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 467 (citations omitted).

Contrary to petitioner's assertion (Pet. 16-17) that a trial court's failure to submit an element of the crime to the jury is "such a fundamental structural flaw in the trial process" that "automatic reversal" is required, recent decisions of this Court hold that both harmless error analysis and plain error analysis are appropriate when a court decides an element of a crime on its own instead of submitting the element to a jury. *Neder* v. *United States*, 527 U.S. 1, 8-15 (1999) (holding that harmless error analysis applies to failure to include materiality element of crime in jury instructions); *Johnson*, 520 U.S. at 465-466 (holding that plain error

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under 18 U.S.C. 2113(a)), and of the exchange rate of American and Canadian currency, see *United States* v. *Dior*, 671 F.2d 351 (9th Cir. 1982) (prosecution under 18 U.S.C. 2314). Even with respect to those very different jurisdictional elements, the courts did not state that those elements were not judicially noticeable, but only that those elements involved adjudicative, rather than legislative, facts and thus the trial court could not require the jury to agree with the judicial notice. See *Mentz*, 840 F.2d at 320; *Dior*, 671 F.2d at 358 n.11.

analysis applies to failure to include materiality element of crime in instructions). As *Johnson* explained, "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Id.* at 466.[4]

Petitioner cannot meet the plain error standard. As discussed above, a majority of the courts of appeals have concluded that the question whether a location is "within the special maritime and territorial jurisdiction of the United States" is a legislative fact and there is no law suggesting that court determinations of legislative facts raise due process and Sixth Amendment concerns. Thus, petitioner cannot show error, let alone obvious error. Even if petitioner could establish obvious error, removing an element of a crime from the consideration of the jury "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. And

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[4] This Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), did not alter the Court's holdings in *Neder* and *Johnson* that harmless or plain error analysis is appropriate when a jury instruction erroneously removes an element of the offense from the jury's consideration. In *Apprendi*, the Court merely held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363. In so holding, the Court did not purport to abrogate application of either the plain-error or harmless-error rules. Indeed, the courts of appeals have continued to apply the plain-error rule to cases involving *Apprendi* errors, and this Court has denied review of one of those decisions. *E.g.*, *United States* v. *Hishaw*, 235 F.3d 565, 574-576 (10th Cir. 2000); *United States* v. *Page*, 232 F.3d 536, 543-544 (6th Cir. 2000), petition for cert. pending, No. 00-7751; *United States* v. *Swatzie*, 228 F.3d 1278, 1281 (11th Cir. 2000); *United States* v. *Meshack*, 225 F.3d 556, 575 (5th Cir. 2000), cert. denied, 121 S. Ct. 834 (2001).

nothing suggests that petitioner was prejudiced by the instruction in this case or that he is entitled to relief as a matter of the court's discretion. See *Johnson*, 520 U.S. at 467. To the contrary, upsetting the verdict at this stage would undermine the fairness, integrity, and public reputation of judicial proceedings. *Id.* at 470.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2001